

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

ORDER GRANTING DEFEN-  
DANT'S MOTION FOR SUMMARY  
JUDGMENT

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This document relates to:  
*Nero v. Wyeth*, C04-137

This matter comes before the court on defendant Wyeth's motion for summary judgment. Having reviewed the briefs filed in support of and opposition to this motion, the court finds and rules as follows.

Plaintiff Dorothy Nero filed her complaint on November 12, 2003 in the Eastern District of Louisiana, alleging that the stroke she suffered on September 2, 1996 was related to ingestion of the Wyeth-manufactured medication Dimetapp. Wyeth's motion argues that under Louisiana Civil Code Article 3492 the limitations period on Nero's claims is one year, which Nero does not dispute. Wyeth submits deposition testimony wherein Nero admitted that during her stay in the hospital in September 1996, or shortly after her release, she associated her stroke with her ingestion of Dimetapp. Exh. B, Nero Dep. at 64 ("Q: And either

1 while you were in the hospital or shortly after you got out of  
2 the hospital, in your mind, you associated your stroke with  
3 taking the Dimetapp? A: Yes."). Wyeth argues that the statute of  
4 limitations began running, if not sooner, at that time. In the  
5 alternative, Wyeth submits that the statute began to run at some  
6 unspecified date, some four years prior to her February 17, 2005  
7 deposition. According to Nero's testimony, she recalls reading  
8 "about four years ago" an article linking the medication she  
9 claims to have taken and stroke. *Id.* at 75-76. That article,  
10 Wyeth argues, should have triggered, at the very latest, Nero's  
11 obligation to file her complaint, which she did not do until at  
12 least more than one year later, and possibly as much as three.  
13 Indeed, when asked "[w]hen did you first decide to file this  
14 lawsuit?" Nero responded, "I think it's been about four years  
15 ago." *Id.*

16 Plaintiff does not dispute the basic facts. She argues,  
17 however, that she should be allowed to avail herself of "*contra*  
18 *non valentem*," Louisiana's discovery rule. The rule provides an  
19 exception to the limitations period where, relevantly here, "the  
20 cause of action is not known or reasonably knowable by the  
21 plaintiff, even though his ignorance is not induced by the  
22 defendant." *Whitnell v. Menville*, 540 So. 2d 304, 308 (La. 1989).  
23 The rule as relied upon here is reserved for the plaintiff "who  
24 is ignorant of the existence of facts that would entitle him to  
25 bring suit," *Cartwright v. Chrysler Corp.*, 232 So. 2d 285, 287  
26 (1970).

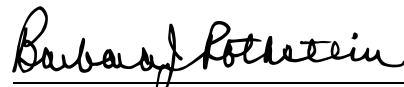
1 In dispute of defendant's first argument, plaintiff merely  
2 asserts in a conclusory and unconvincing fashion that she "did  
3 not know of her cause of action" during the time of her stroke.  
4 She relies on testimony that "I hadn't had a stroke before and I  
5 thought that the medication had made me have a stroke, so it was  
6 something that I had done," as evidence that she did not, and had  
7 no reason to, make a connection between her stroke and the  
8 medication she had ingested. On the contrary, the testimony is  
9 evidence of exactly what the plaintiff states: that she "thought  
10 that the medication had made me have a stroke." It is unclear  
11 under what theory or reasoning plaintiff could understand this  
12 statement to mean its opposite. The court finds that at this  
13 time, therefore, plaintiff had before her all facts necessary to  
14 support a belief -- and that in fact she did believe -- that the  
15 Dimetapp she ingested was related to her stroke.

16 In addition, the court finds that plaintiff was at the very  
17 latest put on notice of the alleged connection when she read the  
18 article concerning the putative link between stroke and PPA. In  
19 her response, plaintiff argues that although defendant has  
20 submitted an article from the Times Picayune dated November 7,  
21 2001 matching the description of the article given in deposition  
22 testimony, there has been no foundation laid establishing that  
23 the article submitted is the same plaintiff claims to have read.  
24 In so arguing, however, plaintiff misconstrues which party here  
25 bears the burden of proof. Defendant has established that on its  
26 face, plaintiff's complaint states a claim on which the statute

1 of limitations has run. It is therefore now plaintiff's burden to  
2 demonstrate that she is entitled to avail herself of the discov-  
3 ery rule. *Lima v. Schmidt*, 595 So. 2d 624 (1992). This she has  
4 failed to do.

5 For the foregoing reasons, defendant's motion for summary  
6 judgment is GRANTED. This case is dismissed.

7 DATED at Seattle, Washington this 9th day of November, 2006.  
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10 BARBARA JACOBS ROTHSTEIN  
11 UNITED STATES DISTRICT JUDGE  
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